STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
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DECISION OF THE BOARD

Mailed and Filed: MARCH 27, 2023

IN THE MATTER OF:
Appeal Board No. 626140 A

PRESENT: RANDALL T. DOUGLAS, MEMBER

In Appeal Board Nos. 626138 A, 626139 A, 626140 A, 626141 A and 626142 A, the Appeal Board, on its motion pursuant to Labor Law § 534, has reopened and

reconsidered Appeal Board Nos. 621204 A, 621205 A , 621206 A , 621207 A and 621208 A, filed May 20, 2022, which adhered to its prior decisions, affirmed the decisions of the Administrative Law Judge and sustained the initial determinations holding, effective June 22, 2020, that the wages paid to the claimant, a non-professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590 (11); charging the claimant with an

overpayment of $1,679 in benefits recoverable pursuant to Labor Law § 597 (4);

charging the claimant with an overpayment of Federal Pandemic Unemployment Compensation (FPUC) benefits of $3,000 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; charging the claimant with an overpayment of Lost Wages Assistance (LWA) benefits of $1,800 recoverable pursuant to 44 CFR Sec. 206.120 (f)(5); and reducing the claimant's right to receive future benefits by eight effective days and charging a civil penalty of $251.85 on the basis that the claimant made a willful misrepresentation to obtain benefits; and holding the claimant ineligible to receive benefits, effective June 8, 2020, on the basis that the claimant was not totally unemployed; charging the claimant with an overpayment of Federal Pandemic Unemployment Compensation of $4,800 recoverable pursuant

to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and charging the claimant with an overpayment of Lost Wages Assistance benefits (LWA) of $1,800 recoverable pursuant to 44 CFR Sec. 206.120 (f)(5).

By order filed January 5, 2023, the Board remanded the case to the Hearing Section for a hearing. The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant, the employer and the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: Since 2016, the claimant was employed by a school district as a 10-month part-time food service worker. She was a permanent employee and a member of a union that had a written collective bargaining agreement (CBA) with the employer. Article 18 of the CBA provides,

Duration A. The provisions of this Agreement shall be effective as of July 1, 2014, and shall remain in full force and effect up to and including June 30, 2019, and shall be renewed automatically from year to year thereafter unless written notice of desire to terminate or modify is given by either party to the other on or before the expiration date. The agreement shall not be reopened unless there is mutual agreement by the parties as expressed in writing to do so.

B. Should the parties be unable to agree upon the terms and conditions of a new Agreement on or before the expiration date of this Agreement as set forth in Section A above, the non-economic provisions of the Agreement shall continue in effect until a new Agreement is negotiated. Status quo shall be maintained with regard to all economic provisions of this Agreement and no employees shall suffer a reduction in salary and/or fringe/benefits until a new Agreement has been negotiated or unless mutually agreed to by the parties.

As a permanent employee, the claimant had civil service rights and her employment was continuous. As such, employees like the claimant were not sent "reasonable assurance" letters at the end of a school year. She was expected to return each year unless told otherwise due to layoff or a disciplinary process. Typically, the claimant worked four hours a day, five days during the week. During the 2019-2020 and 2020-2021 school years, she earned $14.53 an

hour. Her last day of work was during the 2019-2020 school year was June 18, 2020. In late August or early September 2020, she received a letter from the employer providing the hours and location for the 2020-2021 school year.

She worked on five days in the week ending June 14, 2020, and on two days in the week ending June 21, 2020. She did not work and was not paid during the Summer of 2020. On September 9, 2020, she returned to work. She called out sick on September 11. She worked two days in the week ending September 13. She worked 20 hours per week in the weeks ending January 31, 2021, February 7, 2021, and February 14, 2021. She did not work in the week ending February 21, 2021, because it was a school vacation.

When she applied for benefits on June 29, 2020, she informed the Department of Labor that she was a 10-month employee that worked for a school district and she would not be working over the summer. In a questionnaire, she was asked, "In the past 18 mos, were you an employee of an educational institution?" She responded "No" to the question. The claimant has a learning disability and she believed that the question pertained to a college.

The claimant received $1,679 in regular benefits, $4,800 in FPUC benefits, and $1,800 in LWA benefits. Her regular weekly UI benefit rate was established at $146.

OPINION: Pursuant to Labor Law § 590 (11), the wages paid to a claimant who

worked for an educational institution in other than an instructional, research or principal administrative capacity cannot be used to establish a valid original claim or a benefit rate, during a period between academic years or terms or during an established and customary vacation period or holiday recess, if the claimant has reasonable assurance of performing similar services in the next academic year or term, or during an established and customary vacation period or holiday recess for the period immediately following such vacation period or holiday recess. Reasonable assurance may exist by virtue of a contract of employment for services.

The United State Department of Labor Employment & Training Administration Unemployment Insurance Program Letter (UIPL) 5-17, dated December 22, 2016, gives guidance with respect to interpreting the meaning of reasonable assurance under Sections 3304(a)(6)(A)(i) - (iv) of the Federal Unemployment Insurance Tax Act (FUTA). Pursuant to UIPL 5-17, in order for a claimant to

have reasonable assurance in the following year or term, the offered employment must satisfy three prerequisites: (1) the offer of employment may be written, oral, or implied, and must be a genuine offer; that is, an offer made by an individual with actual authority to offer employment; (2) the employment offered in the following year or term, or remainder of the current academic year or term, must be in the same capacity; and (3) the economic conditions of the job offered may not be considerably less in the following academic year or term (or portion thereof) than in the first academic year or term (or portion thereof). The Department interprets "considerably less" to mean that the economic conditions of the job offered will be less than 90 percent of the amount the claimant earned in the first academic year or term.

The credible evidence establishes that the claimant was employed as a part-time permanent food service worker for the school district under a union-employer collective bargaining agreement that continued in effect after June 30, 2019. There was no evidence that she was told that she would be laid off or that she faced any discipline. As per the agreement, she received the same pay in the 2020-2021 school year that she had during the 2019-2020 school. Although she did not receive any formal notice from the employer at the end of the 2020 school year, such notice is redundant and not necessary for permanent employees as it is their contract which provides the requisite reasonable insurance of continued employment (See Appeal Board No. 613042). Further, UIPL 5-17 provides that reasonable assurance may be written or implied, and the written agreement satisfies this requirement. As the terms of the written agreement governing her employment demonstrated that she continued to be employed by the employer, we conclude that he claimant had reasonable assurance of continuing employment for the 2020-2021 school year. As the claimant was ineligible to receive benefits, she was overpaid the regular benefits, $3,000 in FPUC benefits, and $1,800 in LWA benefits. The federal benefits are automatically recoverable.

The credible evidence further establishes that the claimant reported in a questionnaire that she was not an employee of an educational institution for the past 18 months. However, she informed the Department of Labor in her claim application that she was a 10-month employee and worked for a school district. It also significant that the claimant a learning disability and she believed that the question pertained to a college. As she had disclosed that she was a 10-month employee who would not be working over the summer, the Department of Labor was on notice that she was an employee of the school district prior to the release of the regular benefits. Under these circumstances, we find that

the regular benefits are non-recoverable. We further conclude that her response was not a willful false statement and that she is not subject to a forfeit or civil penalty.

The credible evidence further establishes that the claimant worked five days in the week ending June 14, 2020, two days in the week ending June 21, 2020, and two days in the week ending September 13, 2020. However, as she was a part-time 10-month employee who was not paid over the summer, she was totally unemployed after June 19, 2020 until she returned to school on September 9, 2020. Matter of Summers, 21 AD3d 2005 [3d Dept 2005] is distinguishable because in that case, the claimants were full-time paraprofessionals who were paid bi-weekly portions of their annual salaries over a 12-month period. Unlike the claimants in Summers, in the case at hand, the claimant was a part-time hourly employee who was not paid over a 12-month period.

With respect to the period beginning January 18, 2021, new rules were in effect to determine total unemployment. 12 NYCRR § 470.2(h), "Day of Total

Unemployment," effective January 18, 2021, provides:

1.For the purpose of calculating the number of effective days in a week to determine a claimant's weekly benefit entitlement in accordance with Labor Law § 590, a claimant shall experience a "day of total unemployment" or "full day

of total unemployment" on each day that is not a day of employment.

2.The total number of "day(s) of employment" in a week shall be calculated by adding the total number of hours worked in a week of employment, provided however that no hours in excess of ten are included per calendar day, dividing the total number of hours by ten, and rounding up to the nearest whole number. If the total number of hours worked in a week is equal to or less than four hours, no day of employment will have occurred. For example, a claimant who works a total of 3 hours in a week shall be deemed to have engaged in zero days of employment, a claimant who works a total of 8 hours in a week shall be deemed to have engaged in one day of employment, and a claimant who works a total of 13 hours in a week shall be deemed to have engaged in two days of employment, except that if the 13 hours occurred on one calendar day, such claimant shall be deemed to have engaged in one day of employment.

As she worked 20 hours per week in the weeks ending January 31, 2021, February

7, 2021, and February 14, 2021, she was not totally unemployed for two days during this period. As she did not work during the week ending February 21, 2021, she was totally unemployed during the period. Accordingly, we further conclude that the claimant was not totally employer for the modified period at issue.

As to the overpayment of the FPUC benefits during this modified period, the Department of Labor does not seek to recoup any overpaid benefits of the week ending June 14. As to the other weeks at issue, under § 2104 (f)(2) of the

CARES ACT of 2020, FPUC benefits are not recoverable for any week in which a claimant is entitled to at least $1 of regular benefits, PEUC or Extended Benefits. As the claimant worked only two days in the weeks ending June 21, 2020, September 13, January 31, 2021, February 7, 2021, and February 14, 2021, we further conclude that she was eligible to receive at least $1 of regular benefits, making her eligible to receive the FPUC benefits during these weeks.

DECISION: The decisions of the Appeal Board are rescinded.

The decisions of the Administrative Law Judge are modified as follows and, as so modified, are affirmed.

In Appeal Board No. 626138 A, the initial determination, holding, effective June 22, 2020, that the wages paid to the claimant, a non-professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590

(11), is sustained.

In Appeal Board No. 626139 A, the initial determination, charging the claimant with an overpayment of $1,679 in benefits recoverable pursuant to Labor Law §

597 (4); charging the claimant with an overpayment of Federal Pandemic Unemployment Compensation (FPUC) benefits of $3,000 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; charging the claimant with an overpayment of Lost Wages Assistance (LWA) benefits of $1,800 recoverable pursuant to 44 CFR Sec. 206.120 (f)(5), is modified to reflect a non-recoverable overpayment of $1,679

in regular benefits, and as so modified, is sustained.

In Appeal Board No. 626140 A, the initial determination, reducing the claimant's right to receive future benefits by eight effective days and charging a civil penalty of $251.85 on the basis that the claimant made a willful misrepresentation to obtain benefits, is overruled.

In Appeal Board No. 626141 A, the initial determination, holding the claimant ineligible to receive benefits, effective June 8, 2020, on the basis that the claimant was not totally unemployed is modified as noted above, and, as so modified, is sustained.

In Appeal Board No. 626142 A, the initial determination, charging the claimant with an overpayment of Federal Pandemic Unemployment Compensation (FPUC) benefits of $4,800 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and charging the claimant with an overpayment of Lost Wages Assistance (LWA) benefits of $1,800 recoverable pursuant to 44 CFR Sec. 206.120 (f)(5), is overruled.

RANDALL T. DOUGLAS, MEMBER